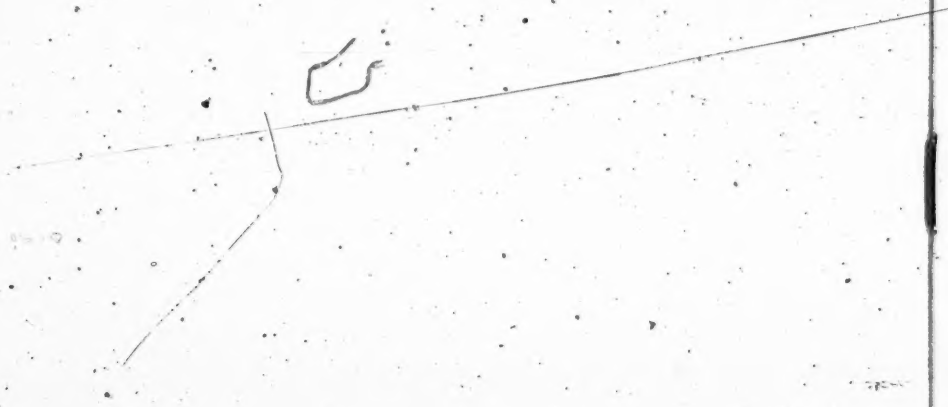

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 457

UNITED STATES OF AMERICA,
Petitioner,

vs.

SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents, The Sac and Fox Tribe of Indians of Oklahoma, Sac and Fox Tribe of the Mississippi in Iowa, The Sac and Fox Tribe of Missouri, Iowa Tribe of the Iowa Reservation in Oklahoma, and Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, file this brief in opposition to the Petition for a Writ of Certiorari filed by the United States to review the judgment of the Court of Claims entered on March 17, 1967. The opinion of the Court of Claims is Appendix A to the Petition in No. 221.[1]

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1 A Petition for Writ of Certiorari (No. 221) was filed by the Respondents which requests review of the Court of Claims judgment on other grounds. Such Petition will be referred to herein as Pet. No. 221. The Petition for Writ of Certiorari herein will be referred to as Petition or Pet.

The opinion of the Indian Claims Commission pertaining to the question presented in the Petition is Appendix A to the Petition herein.

Question Presented and Statement

The question presented is expressed (Pet., p. 2) or described (Pet., p. 4) in the Petition in terms of whether an Indian tribe can acquire compensable Indian title by its use and occupancy of lands *commencing after* the date of United States sovereignty. As stated, the question does not fit the facts and circumstances nor correctly express the issue in the present case. Use and occupancy of the lands claimed by Respondents Sac and Fox and Iowa Nations did not commence *after* but instead existed at and prior to the time (1803) that United States sovereignty attached (Pet. No. 221, pp. 30a-31a, 33a-35a).

The question really is whether Indian title shall be determined as of the time when the Indian tribe loses its property to the United States (in this case by treaties concluded in 1824) as the Court of Claims held (Pet. No. 221, pp. 41a-42a), or whether such title shall be determined as of the time the United States acquired sovereignty, which was the holding of the Commission in the present case (Pet. p. 16).

One requirement of Indian title is that the Indian occupancy of the particular lands be for "a long time."[2] In reversing the Indian Claims Commission, the Court of Claims held:

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[2] Indian title has been defined under the Act as follows:
". . . To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." (*Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 161 Ct. Cl. 189, 201-02, 315 F.2d 896, 903 (1963), *cert. den.* 375 U.S. 921)

"We think the Commission committed error in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 and 1824. Use and occupancy of a portion or of all of the land in question by them between these dates, especially when connected with use and occupancy immediately prior to 1803, could well have been use and occupancy 'for a long time' and sufficient to constitute Indian title to the land." (Pet. No. 221, p. 41a)

Reasons for Denying the Writ

The decision of the Court of Claims as to which review is sought is in accordance with long-established historical, political, administrative and legal precedents. In reaching its decision that Indian title should be determined as of the date the Indians lose their land through treaty or otherwise to the United States, the Court of Claims said:

"It is a matter of common knowledge that in the course of years, and especially during the early years of the United States, the use and occupancy of land by Indian tribes changed continuously. New tribes would appear and old ones would disappear or move on to new territories. Sometimes land of one tribe would be exchanged for that of another, or one tribe would acquire the land of another as the result of an Indian war or by right of conquest." (Pet. No. 221, p. 40a)

"It would not be in accordance with facts nor history to freeze all Indian titles as of the date of the discovery of America, nor with our own Declaration of Independence in 1776. We know that there was considerable change in such titles after these dates. Consequently, it is not possible to fix any cutoff date for the establishment of Indian title, except the date the Indians lose the land through treaty or otherwise. In

this case, that date is 1824, the date of the cession of the land to the United States by treaty." (Pet. No. 221, p. 41a)

Much of the United States was acquired pursuant to treaties which were negotiated with reference to and reflected the contemporary facts of Indian use and occupancy of the ceded lands. The United States did not negotiate with the Indian tribes in the context of which Indian tribe may have owned the lands at some other earlier and remote time, such as the date when the United States acquired sovereignty. For a brief period following the Revolutionary War, the United States unsuccessfully attempted to take a different position in its treaty negotiations. It contended that as the victor in the war it had acquired not only the sovereignty over the Northwest Territory but also the possessory rights of the Indian tribes in those lands. The Indian tribes refused to deal with the United States on this basis and protracted Indian wars ensued. The United States receded from its position, conceded its error, and acknowledged that the—

"... right of soil, of the great country above described [the Northwest Territory], to be in the Indian nations, so long as they desire to occupy the same."[3]

Thereafter, the United States treated with Indian tribes on the basis of the lands which they used and occupied at the time of the cession treaties. In these negotiations, the United States recognized that Indian land ownership could and did change among Indian tribes and accordingly

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[3] Letter dated May 2, 1788, Secretary of War Knox to Governor St. Clair, SF 148; Report dated June 15, 1789, Secretary of War Knox to the President, SF 152; Speech dated July 30, 1793, by Commissioners of the United States to Indian tribes, SF 160, pp. 5-6. The quotation is from page 6 of the last-mentioned exhibit. The exhibits cited are a part of the record in No. 221. The designation "SF" refers to an exhibit offered by the Sac and Fox Petitioners in the proceedings before the Commission.

dealt with the Indian tribes in accordance with the current facts of land ownership. Some of the treaties by their terms expressly refer to land transfers which took place between Indian tribes.[4]

The decision of the Court of Claims is not contrary to and is consistent with the cases of this Court cited in the Petition.[5] None of these cases involves, however remotely, the question of whether Indian title becomes frozen at the

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[4] The following treaties contain examples of situations in which the United States by treaty acknowledged transfers of Indian title from one Indian tribe to another:

Treaty August 18, 1804, 7 Stat 81: Article 4—The Delawares "having exhibited . . . sufficient proof of their right to all the country which lies between the Ohio and White River, and the Miami Tribe who were the original proprietors of the upper part of that country having explicitly acknowledged the title of the Delawares at the general council held at Fort Wayne in the month of June, 1803, the said United States will in future consider the Delawares as the rightful owners . . .". Article 5—"As the Piankishaw tribe have heretofore obstinately persisted in refusing to recognize the title of the Delawares to the tract of country ceded by this treaty . . . the United States will negociate with them . . . ". Treaty August 21, 1805, 7 Stat 91: Article I—"And whereas, the Miami tribes, from whom the Delawares derived their claim, contend that in their cession of said tract to the Delawares it was never their intention to convey to them the right of soil, but to suffer them to occupy it as long as they thought proper, . . . ". Article IV: ". . . the United States do hereby engage to consider [the Miamis, Eel River and Weas] as joint owners of all the country on the Wabash, and its waters . . . not previously ceded to the United States . . ." Article V—"The Putawatimies, Miami, Eel River, and Wea tribes, explicitly acknowledge the right of the Delawares to sell the tract of land, . . . which tract was given by the Piankashaws to the Delawares, about thirty-seven years ago."

The Treaty of August 19, 1825 (7 Stat. 262) established boundary lines among a number of Indian tribes to a large area on both sides of the Mississippi River. The treaty was described by the United States commissioners as representing a "just compromise between former possessions and more recent conquests. . . ." (SF 104, p. 2)

[5] The case of *Quapaw Tribe of Indians* v. *United States*, 128 Ct. Cl. 45, cited at page 7 of the Petition, is not in point. That case held that the Quapaw Indians had abandoned and lost title to a large land area as the result of a substantial and prolonged decline in population. Whether another Indian tribe by occupying the abandoned lands could have acquired Indian title thereto was not involved. That the Indian Claims Commission has prior to the decision of the Court of Claims herein adhered to its holding in the present case that Indian title shall be determined as of the date of soyereignty is not entitled to weight (see Pet. p. 7). The Commission gives no authority for its holdings other than its own decisions.

date of United States sovereignty, or is in any way concerned with changes in land ownership which were constantly taking place among Indian tribes, both before and after the time of United States sovereignty. Instead, the cited cases are concerned with various aspects of a principle of International Law known as the right of discovery which applies among sovereign nations.[6] Under this doctrine, which is a part of the law of the United States (*Johnson* v. *M'Intosh,* 8 Wheat. 543, 587-88), a sovereign nation such as the United States had sovereign or legal title to the lands within its territorial boundaries. But such sovereign or legal title is not to be confused with and is entirely different than the right of use and occupancy which the Indian tribes possessed. As the cases cited in the Petition make clear, the sovereign's legal title was subject always to the right of soil, that is, the right to use, enjoy and occupy the lands, which the Indian inhabitants possessed and an Indian tribe's—

> ". . . right of occupancy is considered as sacred as the fee simple of the whites." (*Mitchell* v. *United States,* 34 U.S. 741, 746)

While we do not know to what eight cases Petitioner refers, we do not believe that the question of when Indian title is to be determined affects anything like 130 million acres or a potential liability of 50 million dollars to 100 million dollars, as claimed in the Petition (Pet. p. 9). Since Petitioner has not seen fit to name the eight cases, its contention is entitled to no weight.

The Congress intended and the Indian Claims Commission Act is broadly stated to provide for the hearing and determination on their merits of all Indian tribal claims, legal, equitable or moral (*Otoe and Missouria Tribe of Indians* v.

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[6] The United States has considered the law of discovery to apply only among sovereign nations and their white citizens. Secretary of War Pickering specifically instructed General Wayne in 1795 to advise the Indian tribes of the Northwest Territory to this effect (SF 167, pp. 4-6).

United States, 131 F. Supp. (Ct. Cl.) 265, 271-75, *cert. den.* 350 U.S. 848). This purpose will be served only if the Indians' title to lands is determined as the Court of Claims has held with reference to the time when the lands were lost to the United States, whether by treaty or otherwise.

Conclusion

The decision of the Court of Claims, is, we submit, correctly decided and is in accordance with historical fact and legal precedent.[7] Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[7] There is no connection between the issue raised by the Petition herein and the issues raised by the Indian tribes' Petition for Certiorari (No. 221) from other aspects of the Court of Claims decision. A full consideration of the issues raised by the Petition in No. 221 can be had without reference to the issue raised by the Petition in No. 457. Therefore, the Petition herein can and should be denied even though the Indian tribes' Petition No. 221 be granted.